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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process of law because exculpatory evidence within the possession and knowledge of the State was withheld from the defense.

2. Whether the Petitioner was denied due process of law because he did not receive reasonably effective assistance of counsel at both stages of his capital murder trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

The Petitioner, Clifford Henry Bowen, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma entered in this proceeding on November 30, 1984.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma in this case is cited as *Bowen v. Oklahoma*, No. F-81-315 (Okl. Cr. Nov. 30, 1984), and the opinion appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on November 30, 1984. A timely Motion for Rehearing on Behalf of the Appellant was denied on March 8, 1985, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following Amendments to the United States Constitution is set forth below:

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was convicted on March 13, 1981 by a jury in the District Court of Oklahoma County, Oklahoma, case number CRF-80-3397, of three counts of the offense of Murder in the First Degree, 21 O.S. 1980 § 701.7. His punishment was fixed by the jury at death in each count. A Motion for New Trial was filed in the District Court on April 9, 1981, and an Amendment to Motion for New Trial was filed on April 29, 1981. The Motion for New Trial was overruled by the District Court on May 7, 1981, and judgment and sentence were imposed on that date.

No appeal bond was set by the District Court, and the Petitioner is currently in the custody of the Oklahoma Department of Corrections.

On February 24, 1982, the Petitioner filed his Appellate Brief with the Court of Criminal Appeals of the

State of Oklahoma, (No. F-81-315), and on the 27th day of April, 1983, the case was orally argued before two of the three judges.

On April 27, 1983, the Petitioner filed his Second Motion for New Trial, and the Court of Criminal Appeals remanded the case to the trial court to determine if an evidentiary hearing was appropriate. The trial court ordered such hearing, and it was held before the Honorable Raymond Naifeh on September 29 and 30, 1983. The trial court submitted Findings of Fact and Conclusions of Law on October 26, 1983, and the Petitioner filed his Supplemental Appellate Brief in the Court of Criminal Appeals on December 19, 1983.

At trial, twelve witnesses testified that the Petitioner was at a special holiday rodeo in Tyler, Texas until about midnight on the night of July 5, 1980. Johnny Wheeler testified that he was at the rodeo with the Petitioner, and called the Petitioner at home and spoke to him on the telephone after 1:00 a.m. on July 6, 1980. (Tr. 467-531).

Three men were shot with a .45 caliber pistol at about 2:00 a.m. on July 6, 1980 at the Guest House Inn in Oklahoma City, Oklahoma. (Tr. 208). No witness could identify the shooter. The State's case relied on two witnesses who identified the Petitioner as the individual who was near the scene shortly prior to the shootings. Mary Chilton, a clerk at the motel, said she observed a man at about 12:15 a.m. standing near the concession area, who remained for about the next two hours. (Tr. 290-292). He had salt and pepper hair, was wearing a red baseball cap, a medium blue long-sleeve shirt, blue jeans, and a pair of work boots. (Tr. 293). He did not wear

glasses, and his face was almost a white, whitish gray (Tr. 317). She did not see the shooting. Carrie Pitchford, a motel guest, said she returned to her room about 1:15 a.m. to 1:30 a.m., and looked out her window to see a large man near the concession area wearing a very white t-shirt, bright red cap and jeans. (Tr. 334-335). His face was very, very white. She identified this man as the Petitioner. (Tr. 335). She did not see the shooting. The manager of the motel said he saw a man with a red ball cap near the candy machine shortly after midnight, but could not describe him. (Tr. 359). Later, he saw someone with a red cap shooting, but could not describe the man or his clothes. (Tr. 360-361).

The State introduced rebuttal testimony that a small executive jet could fly from Tyler, Texas to Oklahoma City, Oklahoma in thirty to thirty-five minutes, and could land at a downtown airstrip, thirteen minutes by car from the motel. (Tr. 577-584). No evidence was introduced that any such flight occurred on July 5 or 6, 1980. At the hearing on the first Motion for New Trial, two expert witnesses testified that it was an absolute impossibility for a jet airplane to fly from Tyler to the downtown Oklahoma City airpark due to the length of the airstrip, its location, airplane characteristics, and safety considerations. (Tr. 815-819). This was confirmed by the manager of the airpark, who testified that he was unaware of any night landing by a jet at his unlighted, non-controlled airfield in the thirty-three years he had been there. (Tr. 831).

On appeal, the Petitioner submitted seventeen propositions of error, and, in his Supplemental Brief, submitted two supplemental propositions of error. Those issues

pertinent to this Petition for Writ of Certiorari are the following:

Based on the foregoing factual background, the Petitioner contended in his Second Motion for New Trial and on appeal that federal constitutional error occurred when exculpatory evidence was withheld regarding a suspect named Lee Crowe who matched the description given by the scene witnesses, who had a motive to kill the primary victim, and who had come to Oklahoma from South Carolina just before the killings. The facts are set out in greater detail under Reason for Granting Certiorari Number One, *infra*. The Oklahoma Court of Criminal Appeals denied relief, holding that all other suspects had been eliminated by the police, and, in the absence of a pre-trial motion to produce exculpatory evidence, the State had no duty to advise the defense of the suspect Crowe. *Bowen v. State, supra,* at 6.

In his Amendment to Motion for New Trial and on appeal, the Petitioner contended that federal constitutional error occurred when he was denied effective assistance of counsel at both stages of his capital murder trial. In his appellate brief, the Petitioner set out ten separate acts or omissions at the guilt or innocence stage which he contended were not characteristic of the reasonable skill and diligence of a reasonably competent defense lawyer defending a capital case, and set out two major omissions occurring during the sentencing phase. As to the latter proceeding, the Petitioner contended he had no advocate at all, because trial defense counsel put on no evidence, and made no final argument whatsoever. The acts and omissions are described in more detail under Reason for Granting Certiorari Number Two, *infra*. The Petitioner contended he was harmed at the guilt or inno-

cence stage by the ineffective assistance of counsel because he was in Tyler, Texas when the killings occurred, but was convicted of three murders in Oklahoma. He contended he was harmed by having no lawyer at the sentencing hearing because he was assessed three sentences to death.

The Oklahoma Court of Criminal Appeals never addressed a single specified act or omission alleged, merely stating that the Petitioner had failed to demonstrate that there is a reasonable probability that, absent the "alleged errors," the verdict would have been altered, or that his punishment would have been lessened. Further, the Oklahoma Court of Criminal Appeals held that there was "no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversarial process caused by deficiencies in counsel's assistance." *Id.* at 9.

On November 30, 1984, the Court of Criminal Appeals affirmed the convictions and sentences of death. Petitioner's Motion For Rehearing was denied on March 8, 1985. On March 15, 1985, the Court of Criminal Appeals set the date of June 17, 1985, for the execution of the Petitioner.

The opinion and two orders of the Court of Criminal Appeals are attached as Appendices A, B, and C, respectively.

REASONS FOR GRANTING CERTIORARI

I. THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT EXCULPATORY EVIDENCE WITHIN THE POSSESSION AND KNOWLEDGE OF THE STATE WAS WITHHELD FROM THE DEFENSE.

A. THE EVIDENCE WITHHELD BY THE STATE:

In July, 1980, in connection with the investigation of the shootings in question, two detectives with the Oklahoma City police department went to Madill, Oklahoma to interview Mrs. Margraves, the mother of Raymond Peters, one of the victims. (Tr. 126).[1] Mrs. Margraves informed the detectives that Patsy, one of Raymond's ex-wives, had been in the Madill area at about the time of the murders. (Tr. 127). Patsy had had a man with her, and Mrs. Margraves was suspicious of the man because Patsy would not introduce him to anyone. (Tr. 127-8). Mrs. Margraves described the man as 6′ 2″, 225 pounds, salt and pepper hair, and wearing some type of cap. This fit the description of the person given by the scene witnesses. (Tr. 128).

The detectives then went to a farm between Russett and Mannsville, Oklahoma. There, they interviewed Jimmy Forguson, brother of Patsy Peters, and Margie Forguson, mother of Patsy Peters. (Tr. 128). The detectives learned that the man with Patsy was Lee Crowe. (Tr. 129). According to Mrs. Forguson, she and Patsy went to a

1. All references to the record under this Reason for Granting Certiorari are to the transcript from the Hearing on the Petitioner's Second Motion for New Trial.

revival meeting in Oklahoma City on the night of the killings. (Tr. 166, 274). Mrs. Forguson believed that Lee Crowe was at home with her husband that night. (Tr. 166). However, no one talked to Mr. Forguson in an effort to confirm this until the summer of 1983. (Tr. 167). To this date, no one has stated under oath that he was with Crowe on that night (Tr. 170).

Shortly after interviewing these witnesses, the detectives learned that Lee Crowe had applied to be a police officer in Irving, Texas. The detectives traveled to Irving and obtained a photograph of Lee Crowe. (Tr. 282). Detective Horn believes that this trip occurred on July 23, 1980. (Tr. 282).

On July 24, the Oklahoma detectives contacted South Carolina authorities for the purpose of obtaining more information about Lee Crowe. (Tr. 16). The Oklahoma detectives described the suspect to South Carolina authorities as 6′ 3″, 230 pounds, salt and pepper hair, beer gut, jeans, and wearing a baseball hat. (Tr. 18). When the description was completed, the South Carolina authorities immediately identified the suspect as Lee Crowe. (Tr. 269). The South Carolina authorities also confirmed that Crowe had been living with Patsy Peters (Tr. 21, 219), was in his late thirties, (the same age as the suspect) (Tr. 20), commonly used a .45 caliber weapon, (the type of weapon used in the killings) (Tr. 19), commonly used very expensive silver-tipped bullets used in the killings (Tr. 49, 252), and had traveled to Oklahoma shortly before the killings. (Tr. 23). South Carolina authorities provided a picture and fingerprint card for Lee Crowe. (Tr. 17). They later mailed shell casings from Crowe's gun. (Tr. 29).

On about the same day, a photo spread was shown to Mary Chilton, one of the scene witnesses. (Tr. 133). The witness picked the Petitioner, not Crowe, out of the photo spread. (Tr. 133). However, the photograph used in the photo spread showed Crowe with a moustache. (Tr. 157). The man at the scene had had no moustache. (Tr. 291). The Oklahoma detectives were aware that Lee Crowe had shaved his moustache at approximately the time of the killings. (Tr. 297). The witness picked the Petitioner out of the line-up despite the earlier description of the man at the scene as in his late thirties. (Tr. 158). Furthermore, contrary to the earlier description, the Petitioner's face does not appear white in the photo spread. (Tr. 159). Crowe definitely appears more pale than the Appellant in the photo spread. (Tr. 160). The same photo spread was sent to California and viewed by Mrs. Pitchford, the other scene witness. (Tr. 135). She also picked the Petitioner out of the same spread. (SX-3). Despite the witness' identification of the Petitioner, the detectives caused the warrant for the murders to be issued in the name of John Doe. (Tr. 156).

On July 28, 1980, the Oklahoma police received information from a confidential informant that Peters was killed because he had "ripped off" Paul Mazzell, and the hit man had come from Charleston, South Carolina. (Tr. 174). Lee Crowe was from Charleston, South Carolina.

Mr. Macy, the District Attorney, testified that his office was aware of the investigation of Lee Crowe. (Tr. 108). He testified that this information was not given to defense counsel for three reasons: The scene witnesses did not pick Crowe out of the photo spread (Tr. 111); Crowe had an alibi (Tr. 112); and Crowe's bullet casings did

not match those found at the scene. (Tr. 112). In reality, the alibi was unconfirmed (Tr. 293), and the scene bullet casings were not connected in any way to the Petitioner either. (Tr. 295). Mr. Hardwicke, the Assistant District Attorney, admitted that when a defense of alibi is involved, identity is the key issue. (Tr. 223). He further admitted that if there was evidence that Lee Crowe matched the description of the shooter, had motive to commit the murder, had the opportunity because he was in Oklahoma, habitually used a weapon of the same caliber of that used in the murder, and had no alibi, this would be exculpatory evidence because it would impeach the eyewitnesses. (Tr. 224).

B. THE LAW

The standard used to determine whether a prosecutor has a duty to disclose exculpatory evidence to the defendant depends upon the circumstances surrounding the nondisclosure. *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). This Court in *Agurs* gave three situations in which the *Brady* rule applies. The first situation involves the use of perjured testimony where the prosecution knew or should have known of the perjury. The second situation occurs when the defendant makes a pretrial request for specific evidence. The withheld evidence is considered material if it might affect the outcome of the trial. Finally, there is the situation in which no specific request for exculpatory evidence was made. This case involves the third situation.

The test which applies when the defense makes a general request for exculpatory evidence or no request at all is that the omitted evidence must create a reasonable doubt that did not otherwise exist, evaluated in the

context of the entire record. *United States v. Agurs, supra.* "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs,* 427 U.S. at 113.

Agurs distinguishes between evidence that was available to the prosecutor during trial and evidence discovered from a neutral source after trial. "On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." 427 U.S. at 111. This Court reasoned that if the standard that applies to the usual motion for a new trial based on newly discovered evidence, also applied when the evidence was in the State's possession, "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Id.* Thus, this Court said that the defendant should not have to satisfy the severe burden of demonstrating that the withheld evidence *probably* would have resulted in acquittal.

In the instant case, the prosecution had knowledge and possession of the undisclosed evidence before and during trial. The State admitted that two of its assistants helped coordinate Lee Crowe's investigation.

The constitutional obligation to disclose exculpatory material is not measured by the willfulness or culpability of the prosecutor, nor is it measured by the nondiligence of defense counsel. *See United States v. Agurs, supra.* Due process guarantees that ". . . the defendant should not suffer for the mistakes of his counsel." *Castleberry v. Crisp,* 414 F. Supp. 945, 949 (N.D. Okl. 1976). *See United States v. Poole,* 379 F.2d 645 (7th Cir. 1967).

> That defense counsel did not specifically request the information, that a 'diligent' defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress evidence in bad faith, are not conclusive, due process can be denied by failure to disclose alone.

United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972). "The essential fairness of the procedure—not the diligence of the defense counsel or the good or bad faith of the prosecutor—is the key issue." *United States v. Steffen,* 641 F.2d 591, 594 (8th Cir.), *cert. denied,* 452 U.S. 943, 101 S.Ct. 3091, 69 L.Ed.2d 959 (1981).

Also, the State may not be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial. *Castleberry,* 414 F. Supp. at 951. *See Giles v. Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737 (1967) (Fortas, J. concurring); *Smith v. United States,* 375 F. Supp. 1244 (E.D. Va. 1974) (it may be sufficient that the undisclosed information, though not admissible in evidence would have been somehow useful to the defense in structuring its case); *United States v. Gleason,* 265 F. Supp. 880 (S.D. N.Y. 1967). In *Martinez v. Wainwright,* 621 F.2d 184 (5th Cir. 1980), the Court held that even if the nondisclosed evidence was inadmissible to prove prior convictions because of hearsay objections, it at least would have provided the defense with the ability to contact the appropriate penal facilities to acquire an official record which would have been admissible.

In the case at bar, the defense verbally asked the prosecution whether there were any other suspects and

the prosecution responded that there were no other suspects. The unfortunate result was that the defense did not find out about suspect Lee Crowe and the surrounding investigation until long after trial. The State is charged with the duty to disclose information not readily discovered by the defense counsel, yet within the hands of the police. *See Cramer v. Fahner,* 683 F.2d 1376 (7th Cir.), *cert. denied,* 459 U.S. 1016, 103 S.Ct. 376, 74 L.Ed.2d 509 (1982). *Martinez v. Wainwright, supra.* The State's facilities for discovering evidence are usually far superior to the defendant's.

> This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government [or State] aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the constitution has been violated. The concern is not that law enforcers are breaking the law, but that innocent people may be convicted.

Levin v. Clark, 408 F.2d 1209, 1211 (D.C. Cir. 1967).

The Petitioner submits that the Oklahoma City Police Department had special means, unavailable to the defense, of discovering certain information. They had the assistance of the out-of-state police, who could relay pertinent details never disclosed to the defense. Instead, the Oklahoma City Police Department performed the decision-making process of determining which evidence was crucial to a jury on guilt and which evidence was not, a function that the United States Constitution bestows on counsel for the defendant.

This Court established the test for determining whether exculpatory evidence is material in situations where the defense makes no request.

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13 [footnotes omitted].

Applying the principles set forth in *Agurs* to the case at bar, attention should be given to the fact that this was a close, hotly-contested case. If the State withheld even slight evidence tending to disprove the Petitioner's guilt, due process has been violated and a new trial is required. The State's case depended almost entirely on the testimony of two witnesses who identified the Petitioner as being present at the scene of the crime at some time before the shootings. The first of these witnesses was Mary Chilton. This was the witness whose testimony was enhanced by hypnosis. Her description of the man at the scene of the crime did not match the Petitioner. She described the man as very pale in color—"almost a white, whitish-gray." This was in direct conflict with the testimony of four neutral witnesses who swore that the Petitioner had a deep suntan at the time in question. Furthermore, her testimony that the man at the scene did not wear glasses conflicts with the known condition of the Petitioner's eyes. Finally, the witness Chilton was

impeached by her previous identification of one William Wayne Simmons as the individual at the scene of the crime. In fact, one of the police officers had previously sworn that Ms. Chilton *positively identified* William Wayne Simmons as the white male who was standing by the vending machine and later observed running from the scene just seconds after the shots had been fired.

The other scene witness who identified the Petitioner was Mrs. Pitchford. She also described the face of the man at the scene as "very, very white." Furthermore, her testimony makes it clear that she only received a very short glimpse of the man in very poor lighting from a distance. In short, the scene identification was very questionable.

On the other hand, the Petitioner called no less than twelve alibi witnesses who placed him three hundred miles away until within an hour of the crime. The testimony of the Petitioner and his wife placed the Petitioner three hundred miles away until the very moment of the crime. The State did little to rebut the testimony of the alibi witnesses, but, instead, relied heavily on testimony which purported to show that it was remotely possible to travel from Tyler, Texas, to the scene of the crime in less than an hour. Evidence adduced at the hearing on the First Motion for New Trial showed that this theory was not only false, but *scientifically impossible.*

Thus, the jury verdict in this case can only be described in the words of this Court, as "already of questionable validity." The evidence known to the prosecution, but withheld from the defense, showed that another individual had motive and opportunity to commit these murders. He traveled to Oklahoma for that purpose. The physical

description of this individual, Lee Crowe, closely matched the description of the man at the scene. Furthermore, Lee Crowe was known to habitually use the type of weapon and ammunition used in the killings. Due process required that this evidence be called to the attention of defense counsel.

The Oklahoma Court of Criminal Appeals, in upholding these convictions and sentences to death, disposed of the Petitioner's argument that it should not be up to the prosecution or police to determine the jury question of whether another person and not the Petitioner was the killer as follows:

> In regard to the potential suspects, each had been eliminated from consideration upon the positive identification of appellant by Chilton and Pitchford. A police detective testified at the hearing for new trial that each of these suspects were eliminated as the evidence uncovered pointed toward appellant's guilt and not theirs.
>
> * * *
>
> From the viewpoint of the prosecution in preparing the case for trial, and throughout the course of the trial, there was insufficient evidence to link any of the other suspects to the killings, when compared to the evidence implicating appellant, which would have put the prosecution on notice of a duty to reveal such evidence *sua sponte*.

Bowen v. State, supra, at 5-6.

In *Grant v. Alldredge,* 498 F.2d 376 (2d Cir. 1974), the government contended that the information was not given the defense, "because the investigators were satisfied to 'wash out' [the other person] as a suspect." The Court in *Grant* said:

> A full disclosure could have, indeed probably would have, led to defense discovery of all the information involving [the other suspect]. That information, in the aggregate, could then have been used by Grant's attorney to support a theory that it was likely that [the other suspect] had committed the crime. Such a defense, it seems to us, could have "induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

Id. at 382.

In recognizing the effect suppressed evidence might have on a jury, the Court stated:

> This standard [of materiality] requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial—whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically.

Levin v. Clark, supra, at 1212.

The evidence withheld by the State was favorable to the Petitioner, and a jury clearly would have acquitted this innocent man had it heard this evidence that another man was the killer. Because the evidence would have created a reasonable doubt that did not otherwise exist, Petitioner's convictions should be reversed and remanded for a new trial.

II. THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT HE DID NOT RECEIVE REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH STAGES OF HIS CAPITAL MURDER TRIAL.

A. THE ACTS AND OMISSIONS OF TRIAL COUNSEL

The record reflects that trial defense counsel engaged in the following acts and omissions:

1. *At Guilt Or Innocence Hearing*

(a) He filed a motion for continuance and a motion in limine but failed to file such pre-trial motions as a motion for discovery, a motion for production of exculpatory evidence, and a motion challenging the out of court identification of the Petitioner by State's witness Mary Chilton after she had undergone hypnosis;

(b) He failed to cross-examine the State's witness Mary Chilton on the basis of her hypnotically enhanced testimony;

(c) He failed to subpoena the Petitioner's co-defendant, who could have testified that he had never known the Petitioner, and did not hire or ask the Petitioner to commit the murders. (Tr. 863);

(d) He failed to introduce evidence in surrebuttal which would have demonstrated that the State's airplane theory was a scientific impossibility;

(e) He failed to request any jury instructions, particularly an instruction on the law of circumstantial evidence, and failed to offer any specific objections to the instructions given by the court;

(f) He failed to make any objection to the prosecutor's argument during the guilt or innocence stage, in which the prosecutor argued outside the record about a hypothetical airplane theory to rebut the Petitioner's defense of alibi (Tr. 628-31, 669);

(g) He failed to make any objection to the prosecutor's argument in which the prosecutor referred to the Petitioner as a "professional hit man" (Tr. 624, 634, 660, 661, 672, 673 675);

(h) He failed to make any objection to the prosecutor's argument in which the prosecutor referred to the crime rate, society's expectations, death as a deterrent, and injected his personal opinion into the case (Tr. 676-77, 682, 699, 700, 702);

2. *At Capital Sentencing Hearing*

(a) He failed to present *any* evidence in behalf of the Petitioner during the death penalty sentencing stage of the trial (Tr. 693); and

(b) He failed to present *any* argument in behalf of the Petitioner during the death penalty sentencing stage (Tr. 702), even though requested to do so by the Petitioner (Tr. 924).

B. THE LAW

The standards for judging attorney performance were established after Petitioner's appeal was argued before the Oklahoma Court of Criminal Appeals. In *Strickland v. Washington,* ____U.S.____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court held that the proper standard is that of reasonably effective assistance of counsel. *Id.* 104 S.Ct. at 2064. No particular set of detailed rules for

counsel's conduct was established; instead the convicted defendant must identify acts or omissions alleged not to have been the result of reasonable professional judgment. These have been set out in Section A above. Once that has been done, the reviewing court is to determine whether same were outside the wide range of professionally competent assistance. Crucial to this determination is the fact that defense counsel's function is to make the adversarial testing process work in the defendant's case.

In *Strickland,* sufficiency of the evidence was no factor, since the defendant therein had pleaded guilty after giving multiple confessions. The real issue in that case was counsel's performance at the sentencing stage. In the instant case, the Petitioner has a clearly meritorious and valid claim of ineffective assistance of counsel at *both* stages of this contested case.

In Petitioner's case, the Oklahoma Court of Criminal Appeals treated this most important constitutional question in one paragraph. At page nine of its opinion, that court states:

> Even with the use of his hindsight enhanced vision, the appellant has simply failed to demonstrate that there is a reasonable probability that, absent the *alleged errors* of which he now complains, the verdict of the jury would have been altered or that his punishment would have been lessened. See, *Strickland v. Washington,* 466 U.S. ____, 104 S.Ct. 2052, ____L.Ed.2d____ (1984). Moreover, the appellant has made no showing that the justice of his sentence was rendered unreliable by *a breakdown in the adversarial process* caused by deficiencies in counsel's assistance. (emphasis added).

Bowen v. State, supra at 9.

In view of this conclusion, a review of the treatment of the seventeen grounds of error urged on direct appeal in the Oklahoma Court of Criminal Appeals is necessary.

The Petitioner attacked the trial court's failure to give the required Oklahoma instruction on circumstantial evidence. The Court: "Appellant's assignment lacks merit for several reasons. First, his trial counsel failed to request such an instruction." *Bowen, supra,* at 2. Next, the Petitioner raised the issue of the trial court's failure to instruct the jury on a necessary element of the offense alleged. The Court: "Again it should be noted that no instructions were offered by defense counsel on this issue or any other issue. Therefore we will only determine whether the lack of the appellant's now proposed instruction constituted fundamental error." *Id.* at 4. When the Petitioner alleged reversible error for failure by the State to deliver exculpatory evidence, the Court stated: "However, as appellant recognizes, no request was made for exculpatory evidence prior to trial." *Id.* at 5. When the Petitioner assigned as error the admission of extrinsic crime evidence, the Court held, "Error, if any in this regard, was clearly invited and therefore not grounds for an error recognizable on appeal." *Id.* at 8.

When the Petitioner urged reversible error because of improper final argument by the prosecutor, including, *inter alia,* referring to the Petitioner as a "professional hit man," the Court answered, "As appellant recognizes in his brief, there was a failure to object at trial to any of these arguments. Because of his failure to object, the appellant has waived further consideration of the arguments, except those arguments which were so fundamentally prejudicial that the court could not have been corrected by instructions to the jury (sic)." *Id.* at 8-9.

When the Petitioner raised the issue that his Motion for New Trial should have been granted because of the newly discovered evidence that the State's rebuttal "airplane theory" was scientifically impossible, the Court held, "nevertheless, once the alibi defense was raised, addressing as it did the issue of time, the appellant could have with reasonable diligence discovered before the trial and presented at trial all the evidence which was presented at the motion for new trial hearing regarding the State's so called airplane theory." *Id.* at 11.

After the Petitioner's appellate counsel called the co-defendant Behrens to the stand at the hearing on Motion for New Trial to testify that he had never met the Petitioner, did not know him, and did not ask him to commit the murders, as alleged by the State, the Court held that evidence not supportive of a new trial because, "The appellant did not use due diligence when he failed to subpoena Behrens and thus elicit his testimony at the trial." *Id.* at 12.

In response to Petitioner's appellate ground that error occurred because a police detective knew of a threat to the victim by another suspect, but failed to include it in his report or inform the defense, the Court stated, "Not only was there a failure to exercise due diligence in obtaining this testimony at trial, the testimony at the hearing on the Motion for New Trial fails to demonstrate anything which was material to the appellant." *Id.*

When the Petitioner filed his Second Motion for New Trial on the basis of newly discovered evidence in that a South Carolina investigation revealed that the same Lee Crowe discussed in Reason For Granting Certiorari Number One, *supra*, had been overheard discussing kill-

ing the victim Ray Peters with Peter's estranged wife Patsy only days before the killing, the Court responded, "It [the trial court] found that the information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so." *Id.* at 13.

When the Petitioner attacked the admissibility of the hypnotically-enhanced testimony of the key witness Mary Chilton, the Court held, "By failing to object to the testimony at the time of its admission, appellant has waived review of the matter by this Court." *Id.* at 14.

When the appellate issue was raised regarding the constitutional infirmity of the Oklahoma death penalty statute governing the sentencing stage, and the corresponding jury instructions, which failed to clearly place the burden of proof on the State, and also failed to prescribe the standard of proof needed as proof beyond a reasonable doubt, the Court held, "Prior to the issuance of this instruction, the appellant did not object to the instructions, did not offer any instructions of his own, and failed to challenge the validity of 21 O.S. 1981, § 701.11. In view of his failures in this regard and after a review of the record on appeal these issues have been waived and are not properly before us." *Id.* at 15.

Thus, eleven separate issues on appeal were decided adversely to the Petitioner based on specified errors identified by the *appellate court*. Clearly, the first prong of the *Strickland* test has been met in the instant case.

The second prong, a showing of prejudice by an undermining of confidence in the outcome, has also surely been met. An innocent man, who was over 300 miles away from the scene of the crimes, was convicted of capital

murder. What more prejudice can be shown? The Oklahoma Court of Criminal Appeals totally ignored the most glaring indicia of incompetency. The major teaching of *United States v. Cronic,* ___U.S.___, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) decided the same day as *Strickland v. Washington, supra,* is that the focus must be on the adversarial process, that is, if the defense lawyer fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of the Sixth Amendment right to counsel. *United States v. Cronic, supra,* 104 S.Ct. at 2045-2046. In *Strickland v. Washington, supra,* this Court also held that: "A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision [citations omitted] that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.,* 104 S.Ct. at 2064.

In the capital sentencing proceeding in the instant case, trial defense counsel *did nothing.* He just sat there. He put on no evidence, although the Petitioner, the Petitioner's wife and step-daughter, and others, were available to testify, and, astoundingly, *he gave no final argument.* As this Court stated in *Strickland,* "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." *Id.,* 104 S.Ct. at 2063. The Oklahoma Court of Criminal Apeals totally ignored these facts. No mention was made of the sentencing stage deficiencies of counsel. The only pronouncement by that court is as follows: "Moreover, the appellant has made no showing that the

justice of his sentence was rendered unreliable by a breakdown in the adversarial process caused by deficiencies in counsel's assistance." *Bowen v. State, supra,* at 9.

There was no adversarial process at the Petitioner's sentencing proceeding.

The decision by the Oklahoma Court of Criminal Appeals is in conflict with the highest courts of other states on this same federal constitutional right to effective assistance of counsel. The California Supreme Court concluded that counsel's failure to call witnesses in mitgation in a death penalty case denied the defendant effective assistance of counsel. *People v. Frierson,* 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979). In *State v. Myles,* 389 So.2d 12 (La. 1980), the Louisiana Supreme Court addressed a situation where counsel presented no evidence in a death penalty hearing, but *did* conduct final argument. Reversing for lack of effective assistance of counsel, that court said:

> In his closing argument the defense counsel did little more than acknowledge the existence of an aggravating circumstance, state that the confession may be regarded as a mitigating circumstance, and submit the matter to the jury. He did not ask the jury to spare the defendant's life. He did not remind the jury that Elvin Myles is a human being or urge the jurors to be mindful of their awesome responsibility in deliberately choosing whether he should live or die. Nor did he emphasize to the jurors any of their legal obligations designed to prevent the arbitrary or capricious imposition of the death penalty, e.g., the requirement that they base their findings upon a beyond a reasonable doubt certainty; their duty to weigh any aggravating circumstance

> found against any and all mitigating circumstances; the duty of each individual juror to hold fast to his honest convictions and to vote to prevent a unanimous verdict in the event he is convinced that the death penalty is inappropriate.
>
> Moreover, the defense attorney's lackluster argument followed his submission of the case for his client's life without evidence. We cannot say that counsel acted unreasonably in deciding not to present any evidence . . . *Having rested his client's case without evidence, however, it was even more imperative that defense counsel advocate his client's cause in closing argument.* The practice of law is a partisan endeavor requiring those who engage in it to represent their clients vigorously even in the face of overwhelming adversity.
>
> The attorney's closing argument, amounting to little more than a mechanical submission of the defendant's fate to the decision-making process with no attempt to influence it, definitely fell below the minimum standard of competency constitutionally required. "[*T*]*he failure to make a closing argument or making one which is clearly perfunctory has been found to constitute ineffective assistance.*" [Cites omitted].

Id. at 30-31 (emphasis added).

In each of those cases, as well as in *Strickland v. Washington, supra,* counsel argued for the life of his client. While one might be able to conjure up a legitimate reason to place no evidence before the sentencing authority, *e.g. Strickland v. Washington, supra,* there can be *no* argument made that failure to produce evidence *combined with* failure to present final argument can ever be an adversarial testing of the prosecution's case in a death penalty proceeding.

This is an example of a situation where counsel's incompetence is so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. *Strickland v. Washington, supra,* 104 S.Ct. at 2073, n.2, (Brennan, J., concurring).

Clearly, in the Petitioner's case, the resulting death penalties are unreliable because there was a total breakdown in the adversarial process that our system counts on to produce just results. The Petitioner's sentencing proceeding was fundamentally unfair.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

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(On Appeal Only)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma by mailing three copies thereof to counsel of record in an envelope properly stamped and addressed as follows:

Michael C. Turpen
Attorney General Of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

NO. F-81-315

CLIFFORD HENRY BOWEN,
Appellant,

v.

STATE OF OKLAHOMA,
Appellee.

(Filed November 30, 1984)

OPINION

BUSSEY, Presiding Judge:

Clifford Henry Bowen was charged with and convicted of the Frst Degree Murders of three men at the Guest House Inn in Oklahoma City on July 6, 1980. Following the convictions, he appealed; and prior to our decision being rendered, he lodged his second request for a new trial. The ground for retrial was newly discovered evidence, and we ordered the district court to conduct an evidentiary hearing to determine the merit of his motion. The district court heard the evidence and entered its findings of fact and conclusions of law denying appellant's motion. Appellant's motions for new trial lack merit, and his judgments and sentences should be AFFIRMED.

On July 6, 1980, at approximately 2:00 a.m., three people were killed as an executioner fired two shots into

each of them with a .45 caliber gun. The victims were Ray Peters, whom the prosecution theorized to be the killer's desired victim, Marvin Nowlin, and Lawrence Evans. These three were the last to leave a poolside party at the Guest House Inn which started the evening of July 5, 1980. Sometime after midnight, a large man appeared in the area of the concession machines by the pool. Later, Mary Lee Chilton positively identified appellant as the man standing near the machines on the evening in question and whom she observed as she passed by on the way to her room prior to the shootings that morning. Carrie Pitchford also identified appellant as the man standing by the poolside concession machines whom she observed when she looked out three times from the window of her room in the motel.

Appellant was initially linked to the shootings because of his suspected connection to Harold Behrens. Behrens had visited Ray Peters, a drug dealer working for him, by the poolside on the evening of the killings. In an uncharacteristic gesture, Behrens put his hand on Peters' shoulder in plain view of the man standing by the concession machines as he left the gathering of people. Behrens had worked in the investigation of appellant by the Oklahoma City Police Department in 1975 as a police officer. Behrens suddenly resigned, and within a day or two, appellant dropped out of sight. A detective who had also worked in the investigation made the connection between Behrens and appellant when he heard the suspect's description. Both Chilton and Pitchford identified appellant in a photographic lineup and at an in-person lineup.

Appellant's defense at trial was alibi, as he produced a number of witnesses who testified he was at a rodeo in

Tyler, Texas, until around midnight on July 5, 1980. The State theorized that appellant left Tyler, Texas, by jet and was able to reach the murder scene within 45 minutes.

On appeal, appellant's first assignment of error is that the trial court's instruction to the jury regarding circumstantial evidence was deficient in that it applied only to their finding of malice aforethought. He claims that all of the State's evidence concerning who committed the homicides was circumstantial and that our case law dictates that an instruction be given to the jury directing that the circumstances must each be consistent with one another and inconsistent with any reasonable hypothesis other than the defendant's guilt, citing *Hager v. State*, 612 P.2d 1369 (Okl. Cr. 1980) and *Roth v. State*, 532 P.2d 1397 (Okl. Cr. 1975).

Appellant's assignment lacks merit for several reasons. First, his trial counsel failed to request such an instruction.

> We have consistently held that where counsel is not satisfied with instructions that are given, or desires the court to give any particular instruction, it is the duty of counsel to prepare and present to the court such desired instructions and request that they be given. In the absence of such a request, the Court of Criminal Appeals will not reverse the case if the instructions generally cover the subject matter of inquiry and there is no fundamental error.

Luckey v. State, 529 P.2d 994, 996 (Okl. Cr. 1974). Further, we held in *Knight v. State*, 73 Okl. Cr. 107, 118 P.2d 255 (1941), that defense counsel's failure to request such an instruction will not stop this Court from reviewing this issue if the evidence presented at trial

was wholly circumstantial and weak in nature. We find the evidence in the present case is neither.

At trial, the State presented the testimony of Chilton and Pitchford who identified appellant as the man who maintained a post by the concession machines near the pool immediately prior to the slayings. At approximately 2:00 a.m. the sound of gunshots rang through the motel. The manager of the motel and his wife testified they stepped to the office window to see some of the six blasts as they erupted, and later to see a large man flee the scene. After appellant was arrested in Tyler, Texas, and Oklahoma City Police interviewed him there in connection with the homicides, without being informed as to the subject of their investigation or of any details surrounding the killings, appellant volunteered that he couldn't have committed the crime as he was "too fat to run." The State's evidence was not so weak or wholly circumstantial so as to bring this case within our holding in *Knight*.

Additionally, though the trial court instructed the jury regarding circumstantial evidence in connection with its instruction concerning malice aforethought, the language of the instruction was sufficiently broad to encompass evidence of identity. The instruction includes the language:

> To warrant a finding upon circumstantial evidence, each fact necessary to the conclusion sought to be established (that is malice aforethought) must be proved by legal and competent evidence beyond a reasonable doubt. Further, all the facts and circumstances proved must not only be consistent with such finding but consistent with each other and inconsistent with any other reasonable conclusion and sufficient to produce in your minds *a reasonable*

> *moral certainty that the accused committed the offense charged against him with malice aforethought.* (Emphasis added.)

Thus, the jury was properly instructed as to how it must determine each element to a reasonable moral certainty, including identity, though the evidence be circumstantial.

Next, appellant assigns as error the trial court's failure to instruct the jury that they had to find beyond a reasonable doubt that he acted jointly with co-defendant Behrens as charged in the information. Again it should be noted that no instructions were offered by defense counsel on this issue or any other issue. Therefore we will only determine whether the lack of the appellant's now proposed instruction constituted fundamental error. Fundamental error has been described by this Court as error which when considered "in view of the whole record, is so fundamentally wrong and prejudicial that it deprived the defendant of a substantial right." *Jones v. State,* 77 Okl. Cr. 285, 141 P.2d 109 (1943). Allegations and evidence of joint action taken with another person in the commisison of the crime were certainly relevant matters to be addressed at trial. They were relevant to show motive but did not of themselves stand as essential or material elements of the crime of murder. Therefore, we do not find the lack of an instruction requiring the State to establish joint action to constitute fundamental error. Accordingly, this assignment of error is without merit.

Appellant alleges in his appeal and in his second motion for new trial that reversible error occurred when the prosecution failed to deliver exculpatory evidence to defense counsel. However, the record does not reveal

that defense counsel made a formal request for exculpatory evidence, though trial counsel contends he made an oral pretrial inquiry as to the existence of other suspects to which the prosecution answered in the negative. He now asserts that the prosecution had a duty to make known to the defense the identity of three potential suspects.

One was William Wayne Simmons. He had been arrested after Chilton picked his picture from an array of photographs. There was hearsay evidence supposedly revealed to the prosecution that Simmons told a man named Thomas Upton, Jr. that he had been at the Guest House Inn on the night of the killings. But Simmons was subsequently released when the eyewitness told officers at a live lineup that the assailant was much larger in size than Simmons.

There was also evidence that one of the three victims, Marvin Nowlin, had recently been threatened with bodily harm by a man named Larry Lowell. Appellant asserts that if the jury had been exposed to this evidence, it would have created a reasonable doubt which did not otherwise exist, citing *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Subsequent to the trial of this matter, a statement was made to South Carolina police by Deana Burris, a roommate of Ray Peters' ex-wife, Patsy Peters. This statement implicated a man named Lee Crowe, the boyfriend of Patsy Peters, who was of similar stature to that of appellant and who was within the State of Oklahoma at the time of the killings. This statement, and a subsequent one given by Deana Burris forms the new evidence which appellant claims justifies a second trial and which will be

discussed later in this opinion. Appellant maintains, however, that Lee Crowe had been a pretrial suspect of which the State had a duty to advise the defense.

Appellant asserts the suppression of the allegedly exculpatory evidence regarding these suspects denied him due process of law under the authority of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, as appellant recognizes, no request was made for exculpatory evidence prior to trial. So analysis of any duty of the prosecution to deliver evidence to the defense must be made from a view before and during the trial. In *Agurs,* the United States Supreme Court stated in this regard:

> [T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

427 U.S. at 108, 96 S.Ct. at 2400.

> [I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.

427 U.S. at 107, 96 S.Ct. at 2399.

In regard to the potential suspects, each had been eliminated from consideration upon the positive identification of appellant by Chilton and Pitchford. A police detective testified at the hearing for new trial that each of these suspects were eliminated as the evidence uncovered pointed toward appellant's guilt and not theirs.

In *Castleberry v. Crisp,* 414 F.Supp. 945, 951 (N.D. Okl. 1976), the court noted:

> that in a case where several eye witnesses identify a defendant as the perpetrator of a crime, or where the physical evidence clearly points to the guilt of a defendant, evidence indicating that someone else may have committed the crime would have to be almost conclusive in order to be material.

From the viewpoint of the prosecution in preparing the case for trial, and throughout the coure of the trial, there was insufficient evidence to link any of the other suspects to the killings, when compared to the evidence implicating appellant, which would have put the prosecution on notice of a duty to reveal such evidence to the defense *sua sponte*. After evaluating the alleged nondisclosure in the context of the entire record and especially when we consider the unwavering eyewitness identification of the appellant by more than one person, we find that the appellant was not denied due process of law or a fair trial in this regard.

In his fourth assignment of error, the appellant maintains that the evidence was insufficient to sustain his conviction. In support of this contention he argues that there was insufficient evidence to prove the identity of the shooter and secondly that there was insufficient evidence to prove joint action.

Appellant's argument that there was insufficient evidence to prove the identity of the shooter is patently frivolous. Appellant points to several discrepancies in the evidence. There was clearly enough evidence presented at trial from which the jury could reasonably have concluded that he was the shooter and was guilty as charged. Therefore there is no reason for the Court of Criminal Appeals to interfere with the verdict. See, *Truelove v. State*, 545 P.2d 1270, 1271 (Okl. Cr. 1976). There was

conflicting testimony by Chilton and Pitchford of the color of the shirt worn by the man in the concession area. There was evidence from the State's witness that the man was pale. Appellant provided testimony that he was tanned on the date in question. "[W]here there is evidence from which the jury could conclude that the defendant is guilty as charged, we will not interfere with the verdict even though there may be sharp conflicts in the evidence." *Renfro v. State,* 607 P.2d 703 (Okl. Cr. 1980). Regardless of how the appellant now characterizes the evidence presented, the record remains clear that two witnesses saw a man they each identified as the appellant standing near the concession area just prior to the killing. Two other witnesses, who actually saw the shooting, described the shooter sufficiently to establish that he was the same man observed earlier in the concession area by the first two witnesses.

Appellant's argument that there was insufficient evidence to prove that he had acted jointly with Harold Dean Behrens is likewise without merit. Behrens' touching of one of the victims as he left the pool area and while in full view of the appellant in conjunction with Behrens' prior connection to the appellant is strong circumstantial evidence of joint action. This is especially true when one considers the fact that the victim touched was a person who dealt drugs for Behrens and who Behrens had a motive to eliminate because Peters had become a liability to him. Jack Zumwalt, Behrens' homosexual lover testified that Behrens told him in June of 1980 that he was afraid Peters was going to become a police informant because he was facing several possible convictions. Section 432 of 22 O.S. 1981, provides that an information need not specifically allege additional acts when charging partici-

pants in a crime to make distinctions of accessories and of principals. (*Bowen v. State,* 606 P.2d 589 (Okl. Cr. 1980). Though there was evidence of joint action, appellant could have been convicted as a principal regardless of the presence of surplusage in the information. Appellant's fourth assignment is without merit.

In his next assignment of error, appellant argues that the trial court erred in permitting the State to introduce evidence of other crimes. He first complains that testimony by a police sergeant improperly revealed to the jury that he had been investigated by the Oklahoma City Police Department's organized crime unit. This testimony however was relevant in that it served to supply the link between the appellant and Behrens. Behrens had been a police officer involved with the organized crime unit's investigation of the appellant in 1975. Appellant further complains that testimony was introduced that he made his living through gambling. In other circumstances, this could have been improper, but in view of the crimes committed and the circumstances surrounding their commission, the appellant's information concerning his claimed occupation was admissible. Appellant also complains that testimony concerning illegal activities conducted by Behrens were improperly allowed. These activities by Behrens were, however, introduced to shed further light on reasons for commission of the crimes. Additional arguments that appellant's life style required resort to illegal activities and references to the appellant as a professional hit man and killer were fair inferences based on the facts presented. Clearly, all these matters were admissible as relating to the appellant's motive and intent in the commission of the crimes. 12 O.S. 1981, § 2404(B). "Wide latitude

is permitted in the admission of evidence to establish motive." *Frye v. State,* 606 P.2d 599 (Okl. Cr. 1980).

The remaining matter of which appellant complains in this assignment of error is the testimony that he was arrested at the same time several firearms were seized from a residence in which he was staying. This evidence was introduced by the prosecution in response to appellant's denial of knowing anything about guns. Error, if any in this regard, was clearly invited and therefore not grounds for an error recognizable on appeal. *Goodrich v. State,* 553 P.2d 210 (Okl. Cr. 1976). This assignment of error is without merit.

In his sixth assignment of error, appellant cites several instances of arguments by the prosecution which he maintains denied him his right to a fair trial. As appellant recognizes in his brief, there was a failure to object at trial to any of these arguments. Because of his failure to object, the appellant has waived further consideration of the arguments, except those arguments which were so fundamentally prejudicial that the court could not have been corrected by instructions to the jury. *McCall v. State,* 539 P.2d 418 (Okl. Cr. 1975). After reviewing the arguments complained of and not finding any fundamentally prejudicial, this assignment of error is overruled.

As his seventh assignment of error, the appellant asserts that he was denied effective assistance of counsel. In his brief and during oral argument before this Court, a plethora of actions and inactions by his trial counsel is set forth to substantiate his assertion. However, for purposes of this appeal it is not necessary to enumerate each of the alleged mistakes of counsel. Appellant has fallen to the temptation of using the benefits of hindsight

to now second guess and assert inadequaces on the part of his veteran and very successful trial counsel. Even with the use of his hindsight enhanced vision, the appellant has simply failed to demonstrate that there is a reasonable probability that, absent the alleged errors of which he now complains, the verdict of the jury would have been altered or that his punishment would have been lessened. See, *Strickland v. Washington,* 466 U.S.____, 104 S.Ct. 2052, ____ L.Ed.2d ____ (1984). Moreover, the appellant has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversarial process caused by deficiencies in counsel's assistance. See, *United States v. Cronic,* 466 U.S.____, 104 S.Ct. 2039, ____ L.Ed.2d ____ (1984). Utilizing the standards set forth in *Strickland v. Washington,* supra, it cannot be said that the appellant has been denied reasonably effective assistant of counsel.

Next he alleges that he should be granted a new trial based upon the discovery of new evidence. The statutory grounds for granting a new trial based on the discovery of new evidence are twofold. First, the new evidence must be material to the defendant and second, the new evidence must be evidence which the defendant could not with reasonable diligence have discovered before the trial. 22 O.S. 1981, § 952. Whether or not a motion for new trial shall be granted is a matter addressed to the discretion of the trial court which, absent an abuse of discretion will not be overruled by the Court of Criminal Appeals. *Lemmon v. State,* 538 P.2d 596 (Okl. Cr. 1975). In determining whether the trial court abused its discretion by refusing to grant a new trial based on the discovery of purportedly new evidence, this Court looks to whether the evidence is material, whether the accused or his coun-

sel exercised the diligence to discover the evidence before trial, whether the evidence is cumulative and whether there is a reasonable probability that if the newly discovered evidence had been introduced at the trial it would have changed the results. *Marlow v. City of Tulsa*, 564 P.2d 243 (Okl. Cr. 1977).

In support of his first motion for new trial, the appellant presented the trial court with five separate matters. It is argued that both separately and cumulatively they constituted a valid basis for a new trial Appellant first argues that testimony presented at the motion hearing regarding the alleged scientific impossibility of traveling from the rodeo grounds outside of Tyler, Texas, where witnesses saw the appellant, to the Guest House Inn in Oklahoma City, the scene of the homicides, within the time parameters established by trial testimony constituted newly discovered evidence which could not have, with reasonable diligence, been discovered before trial. Appellant contends that the "airplane theory" emerged on the last day of the trial thereby depriving him of an opportunity to marshall evidence against the State's theory of the case. The State, in response to the appellant's alibi witnesses had, on rebuttal, elicited testimony from a pilot who stated that it could have been possible for a jet to have transported the accused from an old airfield near the rodeo grounds to Oklahoma City within a time frame which would account for the alibi witnesses and yet justify the State's theory of the case.

There is a certain degree of controversy in the record as to whether the defense had knowledge prior to trial with regard to the prosecutor's intention to present an "airplane theory" on rebuttal. This is not the crucial issue.

The issue is whether the appellant "could not with reasonable diligence have discovered" the new evidence before the trial. 22 O.S. 1981, § 952.

At the hearing on the motion for new trial the appellant went to great lengths to show in detail why it would have been impossible for him to have flown to Oklahoma City in time to commit the murders. Nevertheless, once the alibi defense was raised, addressing as it did the issue of time, the appellant could have with reasonable diligence discovered before the trial and presented at trial all the evidence which was presented at the motion for new trial hearing regarding the State's so called "airplane theory." Furthermore, at the motion for new trial hearing the evidence presented in opposition to the State's theory was an attempt to contradict the testimony of the State's aviation expert. This Court has heretofore held that "newly discovered evidence which goes to impeachment purposes only is not sufficient to warrant a new trial." *Marlow v. City of Tulsa,* supra. We have not looked favorably on attempts to base a motion for new trial on evidence which merely tends to discredit or impeach the trial testimony of an expert in a technical matter. *Maxey v. State,* 526 P.2d 951 (Okl. Cr. 1974). Thus, the trial court did not abuse its discretion when it denied the motion for new trial as based on the attempts to discredit the State's airplane theory.

The second matter argued with regard to the motion for new trial centers around an affidavit sworn to by a convict, Thomas Upton, Jr., stating that Simmons had admitted that he was present at the Guest House Inn on the night of the murders. In view of the testimony presented which showed that Simmons had a facial but not a physical resemblance to the appellant, we find this evi-

dence is not significantly material and therefore not a basis for a new trial.

The third matter addressed by the motion for new trial was testimony by Harold Dean Behrens that he had never met the appellant, did not know him, and did not ask him to commit the murders. The record however shows that Behrens was never subpoenaed to testify at the trial on the appellant's behalf. Whether or not Behrens would have testified at trial is speculation which the trial court correctly avoided when it overruled the motion as based on these grounds. The appellant did not use due diligence when he failed to subpoena Behrens and thus elicit his testimony at the trial. Accordingly, the trial court did not abuse its discretion when it overruled the motion for new trial as based on Behrens' testimony.

The fourth matter on which appellant relied in his motion for new trial was testimony from a police detective whose investigation had revealed that one of the victims had been threatened by a person named Larry Nowell. The appellant was aware of the detective's involvement in the case. Not only was there a failure to exercise due diligence in obtaining this testimony at trial, the testimony at the hearing on the motion for new trial fails to demonstrate anything which was material to the appellant. Accordingly, the trial court did not abuse its discretion when it overruled the motion as based on this evidence.

The final matter addressed by appellant arises out of an affidavit by an attorney in Texas who had represented him when he was questioned in Texas by an Oklahoma detective. The attorney contradicted prior trial testimony when he stated that upon mention of Behrens' name the

appellant had not given any reaction which would have indicated a relationship with Behrens. This attempt to impeach prior trial testimony is not sufficient to warrant a new trial. *Marlow v. City of Tulsa,* supra.

In view of the evidence both separately and cumulatively presented in support of the first motion for new trial and in view of the applicable law, the trial court did not abuse its discretion when it overruled appellant's first motion for new trial.

Appellant's second motion for new trial is based upon the statement of Deana Burris, which was not made until eight months after the trial. This Court directed the district court to conduct an evidentiary hearing and to enter its findings of fact and conclusions of law.

Deana Burris had been a roommate of Ray Peters' ex-wife and she testified that she overheard Patsy Peters and her boyfriend, Lee Crowe, discuss killing Ray Peters in June of 1980. The three shared an apartment in South Carolina, and it was allegedly Patsy's desire to kill Ray Peters to keep him away from their children. Crowe allegedly promised to do the killing. Supposedly, Patsy had tried to lure Ray Peters to South Carolina, but he refused to come. About the time of the killings in question, Patsy and Crowe traveled to Oklahoma with Patsy's children to visit the childrens' grandparents.

Police investigators knew of Patsy's and Crowe's presence in Oklahoma at the time of the killings, but dropped Crowe as a suspect upon the eyewitnesses' identification of appellant and upon learning that Crowe had been in Madill, Oklahoma with Patsy's father on the evening of the shootings.

Appellant claims that had the jury heard this evidence, a reasonable doubt would have been created; that this evidence would have materially affected the verdict. However, there is evidence that both eyewitnesses viewed photographic arrays with Lee Crowe's and appellant's pictures. Each witness identified appellant, and failed to identify Crowe as being at the motel on the evening of the killings.

Ms. Burris was quite candid in discussing her career as a prostitute and of her dependence on certain narcotic drugs at the time she overheard the conversations in June, 1980. Her testimony went uncorroborated.

The district court made a thorough and exhaustive order in this matter. It found that the information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so. Also, the district court noted that the appellant failed to show under what theory of evidence law that the rumors, suspicions and innuendos concerning Crowe would have been admissible in the trial of the case. Further, the district court correctly found that the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish materiality. 22 O.S. 1981, § 952 (Seventh).

The district court did not abuse its discretion and properly disposed of appellant's motion.

Appellant in his ninth assignment of error asserts that the trial court erred by failing to advise him of his statutory right to personally argue against the sentence of death. However, he cites no authority for this contention

other than 21 O.S. 1981, § 701.10 and to say that he was thereby deprived of due process of law. Title 21 O.S. 1981, § 701.10 provides in pertinent part that, "the state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." Both the appellant and his counsel were present in the courtroom when the judge gave the appellant's attorney an opportunity to make an argument during the penalty stage of the trial. Throughout the entire trial the appellant had elected to be represented by his privately retained attorney. It is clear that the appellant was aware of the opportunity given his attorney to argue on his behalf. In view of these circumstances, the trial court did not err by not instructing the appellant that he had the right to personally argue the issue of the penalty to the jury.

In his tenth assignment of error, appellant claims that the testimony given by Mary Chilton was hypnotically enhanced thereby denying him the right to confront the witness. Appellant argues that Chilton's testimony should not have been admitted into evidence. This issue however was not brought up during the trial, but was initially addressed in appellant's motion for new trial. By failing to object to the testimony at the time of its admission, appellant has waived review of the matter by this Court. See *Wells v. State,* 604 P.2d 144 (Okl. Cr. 1979). See also, *Mitchell v. State,* 549 P.2d 96 (Okl. Cr. 1976). But we do note that hypnosis of a witness does not *per se* create error. *See Johnson v. State,* 665 P.2d 815 (Okl. Cr. 1982). Further, no fundamental error appears in the record in this regard.

Appellant in his eleventh assignment of error asserts that 21 O.S. 1981, § 701.11 violates state and federal

due process requirements by failing to clearly place the burden of proof on the State. In his twelfth assignment of error, he argues that the trial court in its instructions failed to instruct on the State's burden of proof. Appellant's thirteenth assignment of error maintains that 21 O.S. 1981, § 701.11 fails to prescribe the standard of proof to be met. Appellant claims in his fourteenth assignment of error that the trial court erred by failing to instruct the jury on the standard of proof the State was required to meet in the penalty stage of the trial.

In the second stage of the trial the jury was instructed in part as follows:

> You are instructed that in the event you unanimously find that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death. In that event the sentence would be imprisonment for life.
>
> If you do unanimously find one or more of these aggravating circumstances existed beyond a reasonable doubt and you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. In that event the sentence would be imprisonment for life.

Prior to the issuance of this instruction, the appellant did not object to the instructions, did not offer any instructions of his own, and failed to challenge the validity of 21 O.S. 1981, § 701.11. In view of his failures in this regard and after a review of the record on appeal

these issues have been waived and are not properly before us. *Jetton v. State,* 632 P.2d 432 (Okl. Cr. 1981). However, this Court has previously held that this statute does not unconstitutionally shift the burden of proof to the defendant. *Ake v. State,* 663 P.2d 1 (Okl. Cr. 1983); *Parks v. State,* 651 P.2d 686 (Okl. Cr. 1982), *cert. denied,* 103 S.Ct. 800. This Court has consistently held that the trial judge's exercise of discretion in instructing the jury will not be interfered with as long as the instructions considered as a whole fairly and accurately state applicable law. *Green v. State,* 611 P.2d 262 (Okl. Cr. 1980). A review of the record reveals no abuse of discretion.

In his last assignment of error, appellant argues that he was denied due process of law because he was held to answer for a capital crime without an indictment by a grand jury. In his brief, appellant recognizes that the United States Supreme Court addressed the issue of whether or not the right to indictment afforded in the Fifth Amendment to the United States Constitution should be extended to state prosecutions in *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed.2d 232 (1884), and ruled that the right to be indicted by a state grand jury was not encompassed within the meaning of "due process of law" contained in the Fourteenth Amendment. Appellant, however, asserts that the Supreme Court's holding in *Hurtado v. California,* supra, should no longer be followed.

We have heretofore held that a prosecution in Oklahoma may be by either indictment or information. *Towning v. State,* 521 P.2d 415 (Okl. Cr. 1974). This view has further been recognized by the federal Court of Appeals for the Tenth Circuit. *Freeman v. Page,* 443

F.2d 493 (10th Cir. 1971). Accordingly, this assignment of error is without merit.

The jury recommended that appellant receive the death penalty for his part in these crimes. The evidence of the cold and calculated executions supports the jury's finding of three aggravating circumstances. First, it was found by them that the murders were especially heinous, atrocious or cruel. Also, that appellant created a great risk of death to more than one person. Finally, the jury found that appellant killed for the purpose of avoiding or preventing a lawful arrest or prosecution. These findings are fully warranted under the evidence.

As required by 21 O.S. 1981, § 701.13(B) this Court makes the following findings with regard to sentences of death which have been imposed by the jury. Accordingly, we find that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's finding of statutory aggravating circumstances as enumerated in 21 O.S. 1981, § 701.12; (3) and the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases after considering the crime and the defendant.[1] 21 O.S. 1981, § 701.13(c)(3).

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1. *Robison v. State*, 677 P.2d 1080 (Okl. Cr. 1984); *Dutton v. State*, 674 P.2d 1134 (Okl. Cr. 1984), *cert. denied*, _____U.S._____, 104 S.Ct. 3548; *Stafford v. State*, 669 P.2d 285 (Okl. Cr. 1983), *vacated on other grounds*, _____U.S._____, 104 S.Ct. 2652 (1984); *Stafford v. State*, 665 P.2d 1205 (Okl. Cr. 1983), *vacated on other grounds*, _____U.S._____, 104 S.Ct. 2652 (1984); *Davis v. State*, 665 P.2d 1186 (Okl. Cr. 1983), *cert. denied*, _____U.S._____, 104 S.Ct. 203; *Parks v. State*, 651 P.2d 686 (Okl. Cr. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 800 (1983); *Jones v. State*, 648 P.2d 1251 (Okl. Cr. 1983), *cert. denied*, _____U.S._____, 103 S.Ct. 799; *Hays v. State*, 617 P.2d 223 (Okl Cr. 1980); and, *Chaney v. State*, 612 P.2d 269 (Okl. Cr. 1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731 (1981).

For the reasons herein stated, the judgments and sentences appealed from should be, and the same are hereby AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA
THE HONORABLE RAYMOND NAIFEH,
DISTRICT JUDGE

CLIFFORD HENRY BOWEN, appellant, was convicted of three (3) counts of Murder in the First Degree, in the District Court of Oklahoma County, Case No. CRF-80-3397. He was sentenced to death on each count, and he appeals. AFFIRMED.

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OPINION BY BUSSEY, P.J.
PARKS, J., CONCURS IN RESULTS
BRETT, J., CONCURS IN RESULTS

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-81-315

CLIFFORD HENRY BOWEN
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

(Filed March 8, 1985)

ORDER DENYING MOTION FOR REHEARING

NOW on this 8th day of March, 1985, the Court having considered the appellant's Motion for Rehearing and the arguments and authorities in support thereof, and being fully advised in the premises, finds that the motion should be and the same hereby is DENIED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 8th day of March, 1985.

/s/ HEZ J. BUSSEY
Hez J. Bussey, Presiding Judge

/s/ ED PARKS
Ed Parks, Judge

/s/ TOM BRETT
Tom Brett, Judge

ATTEST:

/s/ JARVIS PATTERSON
Clerk

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-81-315

CLIFFORD HENRY BOWEN,
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

(Filed March 15, 1985)

ORDER SETTING EXECUTION DATE

On March 12, 1985, the Attorney General filed a motion in this Court requesting that a new execution date be set for the above appellant. On November 30, 1984, appellant's conviction in Case No. CRF-80-3397, in the District Court of Oklahoma County was affirmed by decision of this Court. Furthermore, on March 8, 1985, appellant's petition for rehearing was denied. NOW THEREFORE, insofar as there is nothing further pending in this Court concerning appellant's conviction, this Court finds that a new execution date should be set in accordance with the jury's verdict finding appellant guilty of Murder in the First Degree, in which the death penalty was assessed.

IT IS THEREFORE THE ORDER OF THIS COURT, that the execution date for Clifford Henry Bowen, who was convicted of First Degree Murder, in Oklahoma County District Court, Case No. CRF-80-

3397, in which the death penalty was assessed shall be set for the 17th day of June, 1985.

IT IS SO ORDERED.

WITNESS OUR HANDS AND SEAL OF THIS COURT this 15th day of March, 1985.

/s/ ED PARKS
Ed Parks, Presiding Judge

/s/ TOM BRETT
Tom Brett, Judge

/s/ HEZ J. BUSSEY
Hez J. Bussey, Judge

ATTEST:

/s/ JARVIS PATTERSON
(Clerk)